July 2015

The Search for the Fourth Amendment Seizure: It Won't Be Found on a Bus - Florida v. Bostick

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THE SEARCH FOR THE FOURTH AMENDMENT SEIZURE: IT WON'T BE FOUND ON A BUS - FLORIDA V. BOSTICK

INTRODUCTION

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[1]

The Florida Supreme Court held in *State v. Bostick*[2] that the police tactic of randomly boarding buses at mid-journey stops to conduct suspicionless searches for narcotics traffickers was unconstitutional per se as an impermissible seizure under the Fourth Amendment.[3] The United States Supreme Court reversed in *Florida v. Bostick*.[4] The Court indicated that such searches merely rise to the level of a consensual encounter, which does not trigger Fourth Amendment scrutiny.[5]

The Fourth Amendment was added to the Constitution to protect citizens from the tyranny of the English general warrant which allowed individuals to be singled out for search and seizure without particularized suspicion.[6] The Framers of the Constitution felt that the general warrant was a coercive and unjustified intrusion on individual rights.[7] The Court has always recognized and guarded this right: "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[8] More recently, the Court held in *Katz v. United States*[9] that the Fourth Amendment protects people not places,[10] and that

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[1] U.S. CONST. amend. IV.

[2] 554 So. 2d 1153 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

[3] *Id.* at 1154.

[4] 111 S. Ct. 2382 (1991).

[5] *Id.* at 2388.

[6] *See* Boyd v. United States, 116 U.S. 616, 625-30 (1886).

[7] *Id.*

[8] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[9] 389 U.S. 347 (1967).

[10] *Id.* at 351.

wherever an individual may have an expectation of privacy, he is entitled to be free from governmental intrusion.[11] However, the Court has also recognized that "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[12]

Prior to 1968, the Court guarded against unreasonable seizures of persons by analyzing police conduct in terms of arrest, probable cause and warrants based on probable cause.[13] The Court considered arrest as synonymous with seizure under the Fourth Amendment.[14] The requirement of probable cause[15] was absolute as the minimum justification necessary to make the personal intrusion of an arrest reasonable.[16]

In *Terry v. Ohio*,[17] the Court recognized two exceptions to the probable cause requirement. First, the Court recognized a type of seizure, based on a police officer's reasonable articulable suspicion of criminal activity, which was substantially less intrusive than an arrest and thus could be analyzed under a balancing test rather than under the probable cause standard.[18] The Court balanced the limited violation of individual privacy against the state's interests in crime prevention and detection as well as the police officer's safety.[19] Second, the Court recognized what came to be known as the consensual encounter, which involved a police officer approaching an individual and asking the individual to voluntarily answer questions.[20]

The *Bostick* decision raises important Fourth Amendment questions regarding police encounters with citizens. Part I of this Note discusses the development of the legal standard used for determining when a consensual encounter results in an impermissible seizure. Part II reviews the *Bostick* decision. Part III analyzes the impact of the *Bostick* decision. This section argues that: (1) the status of the legal

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[11] *Id.* at 361 (Harlan, J., concurring).

[12] Elkins v. United States, 364 U.S. 206, 222 (1960).

[13] Dunaway v. New York, 442 U.S. 200, 208 (1979).

[14] *Id.*

[15] Probable cause exists when "the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution" to believe that a crime has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925).

[16] *Dunaway*, 442 U.S. at 208.

[17] 392 U.S. 1 (1968).

[18] *Id.* at 20-27.

[19] *Id.*

[20] *Id.* at 19 n.16.

standard to be used in consensual encounter cases is now uncertain as a result of the Court's holding; (2) the Court sent a strong message to individuals and the law enforcement community by refusing to decide the seizure issue although it had the facts available to do so, and by reversing the Florida Supreme Court's per se rule; and (3) the Court's decisions in *Bostick* and *California v. Hodari D.*[21] could signal a new expansion of police power in encounters with private citizens which do not trigger Fourth Amendment scrutiny.

BACKGROUND

Defining Seizures Under the Fourth Amendment

In *Terry v. Ohio*,[22] the Court decided whether it is always unreasonable for a policeman to stop and detain an individual without probable cause.[23] The Court determined that the initial stages of contact between a police officer and an individual are subject to Fourth Amendment scrutiny.[24] Thus, the Court set the stage for establishing the two exceptions to the probable cause requirement.

The *Terry* Court defined a seizure of a person as occurring when a police officer approaches an individual and restrains that individual's freedom to walk away.[25] The Court held that brief, investigatory detentions were permissible under the Fourth Amendment when based on a reasonable articulable suspicion of criminal activity.[26] The Court also addressed consensual encounters. "Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude

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[21] 111 S. Ct. 1547 (1991).

[22] 392 U.S. 1 (1968).

[23] The case involved a Cleveland detective who noticed suspicious activity by two individuals on a city street. The detective, based on his experience, believed the suspects were casing a retail store for a possible robbery. The detective observed the parties walking by the same store about a dozen times, and then leaving the area on foot. The detective followed the suspects, who joined a third individual, and decided to question them. After receiving a mumbled response to a request for identification, the detective grabbed Terry, spun him around and patted down Terry's outer clothing for weapons, and discovered a pistol. No probable cause existed at the time the detective took action. Terry and the other two suspects were then arrested. *Id.* at 5-7.

[24] The court thus rejected the notion that police conduct short of a full-fledged arrest was not limited by the Fourth Amendment. *Id.* at 17, 19.

[25] *Id.* at 16. "The result was to bring more police investigative activity under judicial scrutiny, while subjecting it to a more flexible standard than that requiring probable cause and a warrant. Note, *Michigan v. Chesternut and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?*, 40 HASTINGS L.J. 203, 207 (1988)[hereinafter Note, *Michigan v. Chesternut*].

[26] 392 U.S. at 21.

that a seizure has occurred."[27] Justice White supported this statement by noting that nothing in the Constitution prohibits a police officer from stopping and questioning an individual on the street.[28] The individual may refuse to cooperate and go on his way.[29]

Between 1968 and 1980, the cases reaching the Supreme Court on seizure issues dealt with the brief, investigatory detentions on which the *Terry* case was based. In *Brown v. Texas*,[30] the Court held that the police detention of an individual who refused to identify himself and disclose the nature of his business in a known high-crime area of El Paso was unreasonable.[31] The Court stated that "[t]he fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct . . . . When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."[32] In *Dunaway v. New York*,[33] Rochester police removed the petitioner from the home of a friend and transported him to the police station for interrogation, based on an informant's tip.[34] The Court held that the police detention for custodial interrogation, without probable cause, violated the Fourth Amendment because it intruded "so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest."[35] Finally, in *United States v. Martinez-Fuerte*,[36] the Court upheld the petitioner's conviction for illegally transporting aliens by holding that brief detentions at border immigration checkpoints were "consistent with the Fourth Amendment."[37]

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[27] *Id.* at 19 n.16. The Court stated that it was not addressing the question of whether an investigative seizure based on less than probable cause for the purpose of detention and/or interrogation was unconstitutional. *Id.*

[28] *Id.* at 34 (White, J., concurring).

[29] *Id.* In discussing the grounds for a constitutionally permissible forcible stop, Justice Harlan's concurring opinion also recognized the right of police to address questions to citizens and the right of the citizen to "ignore his interrogator and walk away." *Id.* at 32-33 (Harlan, J., concurring).

[30] 443 U.S. 47 (1979).

[31] *Id.* at 52.

[32] *Id.*

[33] 442 U.S. 200 (1979).

[34] *Id.* at 202-03.

[35] *Id.* at 216.

[36] 428 U.S. 543 (1976).

[37] *See also* Delaware v. Prouse, 440 U.S. 648 (1979)(brief detention to check driver's license and registration as means of ensuring roadway safety is unreasonable intrusion); Pennsylvania v. Mimms, 434 U.S. 106 (1977)(ordering driver out of car after lawful stop for traffic violation was a *de minimis* intrusion, and a frisk for weapons was justified after a bulge in driver's jacket was observed); United States v. Brignoni-Ponce, 422 U.S. 873 (1975)(brief detention of motorist to inquire as to citizenship was reasonable, but any further detention required consent or probable cause); Adams v. Williams, 407 U.S. 143 (1972)(brief detention to investigate based on a tip from an informant was reasonable); Davis v. Mississippi, 394 U.S. 721 (1969)(brief detention to fingerprint without probable cause was impermissible).

In 1980, the Supreme Court addressed the issue of consensual encounters for the first time in *United States v. Mendenhall*.[38] The *Mendenhall* Court decided whether a seizure occurred when federal drug agents approached Sylvia Mendenhall in an airport concourse, asked to see her airline ticket and identification and asked for permission to question her.[39] Justice Stewart, in an opinion joined only by Justice Rehnquist, held that Mendenhall was not seized during the initial questioning.[40] Justice Stewart found that a seizure occurs only when a reasonable person, under all of the circumstances, believes that he is not free to leave.[41] Justice Stewart also set forth several examples of police conduct which might indicate that a seizure occurred:[42] the threatening presence of several officers; the display of a weapon by one or more officers; some physical touching of the individual by an officer; or the use of authoritative language or tone of voice indicating compliance is required.[43] Each of these examples indicate that the coercive effect of this conduct might turn an otherwise consensual encounter into a seizure.[44] Justice Stewart concluded that, as a matter of law, the absence of all of the named factors would mean that a seizure had not occurred.[45] The remainder of the plurality reached the same decision based on the *Terry* articulable suspicion test.[46]

Over the next decade, the Court addressed the issue of consensual encounters in several cases.[47] Three of these cases were instrumental in the Court's gradual

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[38] 446 U.S. 544 (1980)(plurality opinion), *reh'g denied*, 448 U.S. 908 (1980).

[39] The DEA agents noticed that many of Mendenhall's characteristics fit the drug courier profile upon her arrival in Detroit from Los Angeles. The agents decided to question Mendenhall and, after identifying themselves as police officers, obtained consent to question her and review her documents. The agents' suspicions were heightened when the name on Mendenhall's driver's license (her correct name) was different from the airline ticket. The agents then identified themselves as DEA and asked Mendenhall if she would accompany them to a large office off of the concourse for additional questioning. Mendenhall agreed, and later consented to a strip search which uncovered packets of heroin. *Id.* at 547-49.

[40] *Id.* at 555 (opinion of Stewart, J.).

[41] *Id.* at 554 (opinion of Stewart, J.).

[42] The Court had previously acknowledged the need of police to use questioning as a legitimate law enforcement practice. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973). Justice Stewart's examples were meant to help courts decide when this questioning triggered Fourth Amendment protections.

[43] *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.).

[44] *Id.*

[45] *Id.* at 555. Justice Stewart also indicated that the subjective intention of an officer to prohibit a citizen from leaving was irrelevant unless such intention was conveyed to the citizen. *Id.* at 554 n.6.

[46] Justice Powell did not disagree with Justice Stewart's test, but found the decision to be a close call under that standard. Instead, Justice Powell found that the similarities to the drug courier profile, the difference in names on the ticket and driver's license and the nervous reaction upon learning that the officers were drug agents all raised a reasonable, articulable suspicion and thus no seizure occurred under the *Terry* stop and frisk test. *Id.* at 560-66 (opinion of Powell, J.).

[47] *See* Michigan v. Chesternut, 486 U.S. 567 (1988); Florida v. Rodriguez, 469 U.S. 1 (1984); Immigration and Naturalization Service v. Delgado, 466 U.S. 210 (1984); Florida v. Royer, 460 U.S. 491 (1983).

embracing of the *Mendenhall* reasonable person test.[48] These cases arose out of different fact patterns and reached different conclusions, thus leading the Court to admit that it would have to conduct the seizure analysis on a case by case basis.

In *Florida v. Royer*,[49] a case with facts substantially similar to *Mendenhall*, the Court reached a conclusion that was contrary to *Mendenhall*. The Court's decision appeared to rest on one factual difference between *Royer* and *Mendenhall*. Again, narcotics agents observed Royer, who appeared to match some of the drug courier profile characteristics. Royer was observed carrying two heavy suitcases at the Miami airport, and looking around very nervously. Royer bought a one-way ticket and checked the suitcases through to La Guardia in New York City. The agents approached Royer, identified themselves as police officers, and requested permission to question him and check his identification and ticket. As in *Mendenhall*, the name on the identification did not match the airline ticket or luggage tags. The officers then identified themselves as drug agents. They told Royer that they suspected him of transporting illegal narcotics and asked him to accompany them to a small room off of the concourse, while retaining his ticket and identification.[50] Justice White's opinion held that the agents, in informing Royer of their suspicions and retaining his ticket and identification, had made a sufficient showing of authority to lead a reasonable person to believe that he was not free to leave.[51] The Court also recognized that each case will turn on the totality of the circumstances, and that no one test can be dispositive in every case.[52] Justice Brennan adopted the *Mendenhall* test in an opinion concurring in the result.[53] Justice Blackmun explicitly embraced the standard in his dissenting opinion.[54]

By the time *Immigration and Naturalization Service v. Delgado*[55] reached

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[48] *See* Michigan v. Chesternut, 486 U.S. 567 (1988); Immigration and Naturalization Service v. Delgado, 466 U.S. 210 (1984); Florida v. Royer, 460 U.S. 491 (1983).

[49] 460 U.S. 491 (1983)(plurality opinion).

[50] *Id.* at 493-94.

[51] *Id.* at 501-02 (opinion by White, J.).

[52] *Id.* at 506 (opinion by White, J.).

[53] Justice Brennan felt that no reasonable person would feel free to leave once he was approached by police officers requesting permission to question him and examine his ticket and identification. *Id.* at 511-12 (Brennan, J., concurring in result).

[54] *Id.* at 514 (Blackmun, J., dissenting). The reaction to the *Mendenhall/Royer* decisions was mixed. *Compare* Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 867 (1985)(the standard may be the only appropriate and feasible one because it regulates police activity only when a reasonable person would feel that his protected interest in personal liberty had been intruded upon) *with* Latzer, *Royer, Profiles, and the Emerging Three-Tier Approach to the Fourth Amendment*, 11 AM. J. CRIM. LAW 149, 167 (1983)(the standard gives police new strength by freeing pre-seizure police-citizen encounters from Fourth Amendment limitations).

[55] 466 U.S. 210 (1984).

the Court in 1984, a majority had adopted the *Mendenhall* test as the proper standard for consensual encounters.[56] The Court held that mere questioning by police regarding identity or a request for identification,[57] standing alone, does not constitute a seizure under the Fourth Amendment.[58] INS agents, displaying badges and fully identifying themselves, systematically questioned California factory workers regarding their citizenship, and requested supporting documentation when they felt it was necessary.[59] INS agents were also stationed at all exits from the factory which, according to Justice Rehnquist's majority opinion, was merely to ensure that every worker was questioned.[60] Delgado sued on the grounds that the entire workforce was seized, as well as each individual who was questioned.[61] The employees were free to continue working and move about the factory while the surveys were being conducted, which led the Court to the conclusion that a reasonable person[62] would have felt free to leave.[63] The Court found these surveys to be classic consensual encounters.[64] The Court further held that the location of the encounter is not dispositive, it is only one factor to be evaluated in determining whether or not a consensual encounter occurred.[65] The Court also held that an employee's freedom of movement is meaningfully restricted by a voluntary obligation to the employer, and not due to

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[56] In this case, the *Mendenhall* test was applied to factory surveys or sweeps by INS agents in the search for illegal aliens. *Id.* at 210-13.

[57] The officers' questioning regarding identity in *Mendenhall* and *Royer* was merely preliminary to the primary purpose of determining whether the detainees were involved with illegal drugs. However, the agents' questioning in *Delgado* regarding citizenship went to the central purpose of discovering illegal aliens. The Court failed to make this distinction in analyzing the seizure issue. Caldwell, *Seizures of the Fourth Kind: Changing the Rules*, 33 CLEV. ST. L. REV. 323, 333 (1984-85).

[58] *Delgado*, 466 U.S. at 216.

[59] *Id.* at 210-13.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 216. The Court's reasonable person analysis became strained and divorced from the meaning of the test. The Court did not attempt to determine whether a reasonable person faced with this police encounter would feel free to leave. Instead, the Court looked at the reasonableness of the police conduct, viewed objectively, rather than the impact of such conduct on a reasonable person in the same circumstances. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 637 (1990)[hereinafter *Definition of a Seizure*].

[63] The Court adopted the *Mendenhall* test but then failed to analyze the factors under that test which indicate the occurrence of a seizure. There was clearly an official show of authority which should not have survived the *Mendenhall* test. The numerous INS agents were all displaying badges, were visibly armed, were carrying walkie-talkies and handcuffs and were blocking all of the exits. Note, *Brief Encounters of the "Alien" Kind - Challenges to Factory Sweeps and Detentive Questioning: I.N.S. v. Delgado*, 15 SW. U.L. REV. 474, 504 (1985).

[64] *Delgado*, 466 U.S. at 218. Concern was expressed that the *Delgado* decision would amount to a blank check for law enforcement officers to infringe upon the personal security of large groups of citizens and resident aliens. Such conduct would be free from Fourth Amendment scrutiny because it would be considered a brief, consensual encounter. Note, *Immigration and Naturalization Service v. Delgado: Factory Raids: Seizure or Brief Encounter?*, 18 J. MARSHALL L. REV. 509, 523 (1985).

[65] *Delgado*, 466 U.S. at 217 n.5.

any conduct by law enforcement officials.[66] The *Bostick* Court found Delgado factually indistinguishable.[67]

Finally, in 1988 the Court applied the *Mendenhall* test to an investigatory pursuit by police in *Michigan v. Chesternut*.[68] Chesternut was in a high-crime neighborhood and began to run upon observing the approach of a police cruiser. The cruiser then proceeded to follow Chesternut and drive alongside him, without activating its lights or siren.[69] The Court held that no seizure occurred because a reasonable person would have felt free to disregard the police presence and go about his business.[70] The Court criticized both parties for urging the Court to adopt a bright-line rule which would apply to all investigatory pursuits.[71] The Court restated its position, set forth in *Royer*, that each case must be decided on the totality of the circumstances.[72]

The *Chesternut* Court also provided a thorough analysis of the theories of the *Mendenhall* test.[73] The test must be inexact in order to assess the overall coercive effect of police conduct rather than focusing on particular conduct in isolation.[74] The conduct that prompts an individual to believe that he is not free

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[66] *Id.* at 218.

[67] The *Delgado* decision presented a confusing and uncertain application of the *Mendenhall* test despite the Court's adoption of it. The Court held that a reasonable person would have felt free to ignore the agents' questioning and leave the factory via the exits which were blocked by additional agents. This interpretation of the objective standard seems to be out of touch with reality. This decision set the stage, as seen in *Bostick*, for leaving a large number of police-citizen encounters, where individual rights are actually and significantly intruded upon, unregulated by Fourth Amendment limitations. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 869 (1985).

[68] 486 U.S. 567 (1988).

[69] Chesternut was standing alone on a corner when two officers in a police cruiser observed a car pull over to the curb, with a man getting out and approaching Chesternut. The policemen stated that they only wanted to "see where Chesternut was going." They observed Chesternut discard a number of packets which turned out to be codeine pills. Chesternut stopped shortly after discarding the packets and was arrested. He was found to be carrying other illegal narcotics as well. The Michigan state courts dismissed the charge, holding that the police chase was an impermissible seizure. *Id.* at 569-70.

[70] *Id.* at 569. Justice Blackmun added in a footnote that the Court was not deciding at what point a police chase amounts to a seizure. This indicates that the majority felt that such a point existed. *Id.* at 575 n.9. However, Justice Kennedy, along with Justice Scalia, gave a glimpse of things to come in a concurring opinion. Justice Kennedy wrote that regardless of whether a reasonable person believes that the police intend to apprehend him, no Fourth Amendment protections are triggered until such conduct reaches a restraining effect. *Id.* at 577 (Kennedy, J., concurring).

[71] *Id.* at 572. At least one commentator advocated such a rule. Note, *Michigan v. Chesternut*, *supra* note 25 at 219 (the Court should abandon a case by case analysis and hold that every police chase of a citizen is a seizure. The only inquiry would concern the reasonableness of the seizure).

[72] *Chesternut*, 486 U.S. at 572. Professor LaFave found it significant that the Court chose to decide the case using the *Mendenhall* test instead of adopting one of the bright line rules proposed by the parties. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2 (Supp. 1991).

[73] *Chesternut*, 486 U.S. at 573-74.

[74] *Id.* at 573.

to leave will vary with the police conduct in each encounter as well as the setting.[75] The test is flexible enough to apply to the entire range of police conduct in any setting.[76] The objective standard allows for consistent application in each encounter without taking into account the subjective reactions of the individual.[77] The standard also gives the police a gauge by which to judge their conduct against the Fourth Amendment in advance.[78]

Prior to the *Bostick* case, the *Mendenhall* test appeared to be firmly entrenched as the legal standard for consensual encounters under the Fourth Amendment. While *Chesternut's* holding was not framed in terms of the "free to leave" standard, the Court appeared to be fully defending the merits of the *Mendenhall* test in its opinion.

STATEMENT OF THE CASE

Facts

Terrance Bostick was a passenger on a bus traveling from Miami to Atlanta, which had made a scheduled stop in Fort Lauderdale.[79] Two Broward County Sheriffs boarded the bus wearing green "raid jackets" which bore the department insignia.[80] This practice was part of a routine police procedure of "sweeping buses" at intermediate stops to search for drug traffickers.[81] The officers clearly displayed badges.[82] One officer carried a zipper pouch which obviously contained a pistol, although the pistol itself was not visible.[83] The officers, without any articulable suspicion, approached Bostick and asked to see his ticket and identification.[84] The officers promptly returned Bostick's ticket and

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[75] *Id.* The Court failed to mention that Chesternut was running down an alley with buildings on one side of him and the police cruiser on the other. Note, *Michigan v. Chesternut*, *supra* note 25, at 218.

[76] 486 U.S. at 574.

[77] *Id.* However, Chesternut exercised his right to leave the presence of the officers when he began to run. The continued pursuit by the police should have constituted a seizure. The police forced Chesternut to keep running which ultimately led to his belief that he was not free to leave. It is hard to imagine any reasonable person who would not feel that his freedom of movement was restricted under these circumstances. Note, *Michigan v. Chesternut*, *supra* note 25, at 218.

[78] 486 U.S. at 574.

[79] 111 S. Ct. 2382, 2384 (1991).

[80] *Id.*

[81] *Id.* The Court discussed the use of police surveillance at airports, train stations and bus depots. The Court stated that police officers routinely approach individuals, either randomly or due to some vague suspicion of criminal activity. The officers then ask potentially incriminating questions. *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 2384-85. Bostick was lying across the rear seat on the driver's side of the bus. There were factual disputes as to whether: Bostick was asleep when approached; Bostick was physically touched by the officers; and, Bostick was informed of his right to refuse to consent to the questioning. Bostick did not dispute the fact that the officers spoke in normal, conversational tones. Brief of Respondent at 2-4,

identification when they saw that they matched.[85] The officers then identified themselves as narcotics agents and requested permission to search Bostick's luggage.[86] Bostick was using a red tote bag as a pillow, and consented to a search of the bag upon receiving approval from the bag's owner.[87] The officers then requested permission to search a blue bag belonging to Bostick which was in the overhead luggage rack.[88] The officers discovered cocaine and arrested Bostick.[89] The facts were in dispute as to whether Bostick consented to the search of this second bag and whether he was informed of his right to refuse to consent to the search.[90] The trial court, in considering Bostick's motion to suppress the cocaine as evidence resulting from an impermissible seizure, resolved these disputes, being questions of fact, in the state's favor.[91] The trial court denied Bostick's motion to suppress.[92]

Bostick then entered a guilty plea and appealed the denial of his motion to suppress.[93] The Florida District Court of Appeals affirmed per curiam, but considered the issue to be of sufficient public importance that it certified a question to the Florida Supreme Court.[94] The certified question was:

> May the police without articulable suspicion, board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to the search?[95]

The Florida Supreme Court rephrased the question to read:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?[96]

Florida v. Bostick, 111 S. Ct. 2382 (No. 89-1717).

[85] 111 S. Ct. at 2385.

[86] *Id.*

[87] Brief of Respondent at 4, *Bostick* (No. 89-1717).

[88] *Id.*

[89] 111 S. Ct. at 2385.

[90] *Id.*

[91] *Id.*

[92] *Id.* The trial court made no findings of fact in denying Bostick's motion. *Id.*

[93] *Id.*

[94] Bostick v. State, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987)(*per curiam*), *rev'd*, 554 So. 2d 1153 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

[95] *Id.*

[96] Bostick v. State, 554 So. 2d 1153, 1154 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

The Florida Supreme Court answered the question in the affirmative by a 4-3 vote, thus overruling the lower court's opinion.[97]

The Supreme Court Decision

The United States Supreme Court, in a 6-3 vote, reversed the Florida Supreme Court's ruling that such bus sweeps are unconstitutional per se.[98] The Court remanded the case for further consideration under the correct legal standard.[99] The Court held that the correct legal standard is whether a reasonable person would feel free, under all of the circumstances, to decline the officers' requests or otherwise terminate the encounter.[100] The Court reiterated its previous holdings that the mere questioning of an individual by the police, even with no basis for suspicion of criminal activity,[101] does not trigger Fourth Amendment scrutiny.[102]

The Court held that Bostick's focus on the fact that a reasonable person would not have felt free to leave the bus under these circumstances was inappropriate.[103] The Court stated that questioning whether an individual would feel free to leave does not accurately measure the coercive effect of police conduct when a person has no desire to leave his seat on a bus,[104] as it does when the person is walking down a street or through an airport concourse.[105]

The Court found the *Delgado* case to be factually indistinguishable from and dispositive of the *Bostick* case.[106] The Court analogized the restrictions on an employee's movement while at work out of a voluntary obligation to his employer to Bostick's confinement to the bus out of a voluntary choice of this

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[97] *Id.*

[98] 111 S. Ct. at 2389.

[99] *Id.* at 2388.

[100] *Id.* at 2389.

[101] One commentator advocates the adoption of a per se rule based on the police purpose in initiating the encounter. If the purpose is to determine complicity in criminal activity, the officer should have to show an objective basis of reasonable suspicion for doing so. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 442 (1988)[hereinafter *Bright Line Seizures*].

[102] The Court reviewed its holdings in *Terry*, *Mendenhall*, *Royer* and *Delgado*. The Court indicated that if the same encounter had taken place in the bus terminal, or prior to Bostick boarding the bus, it clearly would not have amounted to a seizure. 111 S. Ct. at 2386.

[103] *Id.* at 2387.

[104] However, the Fourth Amendment protects an individual's reasonable expectations of privacy. The objective factor in this test is the location of the encounter. This factor is critical because a citizen's reasonable expectation of privacy will be dependent upon his environment. Note, *Reexamining Fourth Amendment Seizures: A New Starting Point*, 9 HOFSTRA L. REV. 211, 232 (1980).

[105] 111 S. Ct. at 2387.

[106] *Id.*

method of transportation.[107] Thus, the Court did not feel that Bostick was restrained by any police conduct.[108]

The Court refrained from deciding the seizure issue.[109] The Court based this decision on the fact that the trial court made no express findings of fact, and that the Florida Supreme Court rested its decision solely on the fact that the encounter took place on a bus.[110] The Court did express doubt as to whether a seizure had occurred.[111]

Justice Marshall dissented, joined by Justices Blackmun and Stevens.[112] The dissent was highly critical of the majority and argued that such routine bus sweeps are clearly a violation of an individual's Fourth Amendment rights and should be discontinued.[113]

ANALYSIS

The *Bostick* Court appears to have, at a minimum, modified, if not completely abandoned, the *Mendenhall* free to leave test. This conclusion gains further support when the *Bostick* decision is viewed in conjunction with the earlier *California v. Hodari D.*[114] decision. The *Bostick* Court's reasoning for refusing to decide the seizure issue appears to be unsupported. This refusal, when combined with the *Hodari D.* decision, seems to signal a further restriction of individual Fourth Amendment rights.

Where Did Mendenhall Go?

Prior to *Bostick*, the free to leave test had been adopted as the standard in consensual encounter cases under the Fourth Amendment. Federal courts applied

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[107] *Id.* The Court reiterated its objective analysis of the INS agents' conduct, which should not have given any of the employees a fear of being detained if they gave truthful answers or refused to cooperate. *Id.* The Court used this same reasoning to decide that the focus should be an objective analysis of the officers' conduct and not what a reasonable person would feel under the same circumstances. *See supra* note 62 and accompanying text.

[108] 111 S. Ct. at 2387.

[109] *Id.* at 2388.

[110] *Id.*

[111] *Id.* The Court described the encounter as merely two officers approaching Bostick on the bus, asking him a few questions and requesting permission to search his luggage. The Court stated that this type of encounter does not result in a seizure unless the officers somehow convey the message that compliance is required. The Court pointed to the facts, recited by the Florida Supreme Court, that the officers never pointed weapons at Bostick or otherwise threatened him. They also advised Bostick of his right to refuse consent to the search of his luggage. *Id.*

[112] *Id.* at 2389 (Marshall, J., dissenting).

[113] *Id.* at 2394.

[114] 111 S. Ct. 1547 (1991).

this test to encounters in airport lobbies,[115] factories,[116] city streets,[117] airplanes,[118] trains[119] and buses.[120] State courts had also used this standard in a variety of circumstances.[121] The Florida Supreme Court based its decision that the bus sweeps were unconstitutional on the *Mendenhall* free to leave standard.[122]

The *Bostick* Court reversed the decision, holding that the free to leave test was not the correct legal standard to apply in these circumstances.[123] The Court held that the proper inquiry in such a situation is whether a reasonable person would feel free to either decline the officers' requests or otherwise terminate the encounter.[124] The Court further held that the "crucial test" is whether a reasonable person, under all of the circumstances, would feel free to ignore the police presence and go about his business.[125] This "crucial test" was the *Chesternut* holding.[126]

The *Bostick* Court stated that its formulation of the test "follows logically from prior cases and breaks no new ground."[127] The Court also stated that its decision follows logically from a line of cases dating back over twenty years to *Terry*.[128] The Court used these statements to justify its holding. The Court thus suggested that its test and holding in *Bostick* are well-settled principles of law

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[115] *E.g.*, Florida v. Rodriquez, 469 U.S. 1 (1984); Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

[116] *E.g.*, Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210 (1984).

[117] *E.g.*, Michigan v. Chesternut, 486 U.S. 567 (1988).

[118] *E.g.*, United States v. Grant, 734 F. Supp. 797 (E.D. Mich. 1990).

[119] *E.g.*, United States v. Tavolucci, 895 F.2d 1423 (D.C. Cir. 1990).

[120] *E.g.*, United States v. Lewis, 728 F. Supp. 784 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990); United States v. Flowers, 912 F.2d 707 (4th Cir. 1990); United States v. Fields, 909 F.2d 470 (11th Cir. 1990).

[121] *E.g.*, Florida v. Kerwick, 512 So. 2d 347 (Fla. Dist. Ct. App 1987); North Carolina v. Christie, 385 S.E.2d 181 (N.C. Ct. App. 1989).

[122] Bostick v. State, 554 So. 2d 1153, 1155 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

[123] 111 S. Ct. at 2387. The Court used *Delgado* by analogy to determine that free to leave was not the correct standard because Bostick voluntarily confined himself by choosing to travel by bus. *Id.* Justice Marshall was highly critical of this reasoning, stating that it "borders on sophism and trivializes the values that underlie the Fourth Amendment." Justice Marshall likened the majority's reasoning to a person's voluntary decision to place himself in a room with only one exit. This voluntary decision does not authorize the police to block the exit and thereby force an encounter. Justice Marshall then concluded that it is no more acceptable for police to exploit a person's voluntary decision to "expose himself to perfectly legitimate personal or social constraints." *Id.* at 2394 (Marshall, J., dissenting).

[124] *Id.* at 2388.

[125] *Id.* at 2387.

[126] *Chesternut*, 486 U.S. at 569.

[127] 111 S. Ct. at 2387.

[128] *Id.* at 2388.

established in previous Fourth Amendment cases.[129] The Fourth Circuit Court of Appeals, in a factually similar case, held that "free to leave" in the context of a bus passenger case means the freedom to break off contact with the police, at which point the passenger must be left alone.[130] Thus, the *Bostick* Court may have been merely interpreting the free to leave standard and reformulating the test to fit the circumstances of this particular bus sweep case.

However, the Court's opinion contains inconsistencies regarding the legal standard, which leads one to believe that the *Mendenhall* test has been changed or abandoned.[131] The Court's bold statements about "breaking no new ground" could indicate: (1) a fear that the standard may be perceived to be shifting; (2) an attempt to veil an actual subtle shift in the test; or (3) a blatant increase of police powers couched in soothing language, implying that this has been the test all along.

The Court stated that it makes sense to inquire whether a reasonable person would feel free to leave when the encounter takes place on a city street or in an airport lobby.[132] When a person is a passenger on a bus, asking whether a reasonable person would feel free to leave is inapplicable.[133] The Court's analysis seems to acknowledge a distinction as to the location of the encounter being determinative of the legal standard to be applied. Yet, the Court later stated that location is only one factor to be considered.[134] The Court may have set the stage for confusion on the part of lower courts which may try to apply the "free to leave" test when a person can walk away and the "terminate the encounter" test when walking away is not possible.

An examination of *Chesternut* reveals that the Court used the free to leave

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[129] However, there has not been a consistent consensus regarding the meaning and the application of the reasonable person test. The Court found a seizure under this test only in the *Royer* case, where the police conduct resembled a physical seizure. *Mendenhall*, *Delgado* and *Chesternut* all show that permissible police conduct under the Fourth Amendment is quite broad. The results of these four cases indicate that a seizure will result only when the conduct is similar to a physical restraint. In addition, *Delgado* appeared to shift the focus from what a reasonable person would believe to the reasonableness of the police conduct in general. *Definition of a Seizure*, *supra* note 62, at 639. These trends appear to have been continued by the *Bostick* Court.

[130] United States v. Flowers, 912 F.2d 707 (4th Cir. 1990).

[131] At least one commentator believed that *Delgado* replaced the *Mendenhall* test. The broad expansion of police powers resulting from that decision made any future reference to the free to leave standard meaningless. Caldwell, *Seizures of the Fourth Kind: Changing the Rules*, 33 CLEV. ST. L. REV. 323, 337-38 (1984-85).

[132] 111 S. Ct. at 2388.

[133] *Id.* at 2387.

[134] *Id. See supra* note 104 and accompanying text.

test in its analysis.[135] The Court went on to explain the need for the test to be inexact and flexible so that it would apply to the entire spectrum of encounters between police and private citizens.[136]

The *Bostick* Court's statement that its crucial test has been stated before in *Chesternut* raises two problems. First, the *Bostick* Court's "test" follows *only* from the *Chesternut* case, and not "prior cases breaking no new ground"[137] as the Court stated in its opinion. Second, the *Bostick* Court's *test* was the holding from *Chesternut*.[138] The *Chesternut* Court's opinion gave no indication that the Court was modifying or abandoning the *Mendenhall* test.[139] In fact, the opinion explained and defended the merits of the "free to leave" test. The *Chesternut* Court's holding appeared to be nothing more than a conclusion under those specific facts,[140] reached from the free to leave test analysis.[141]

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[135] Professor LaFave expressed satisfaction with the result in *Chesternut*, and the method of application of the *Mendenhall* test by the Court to the facts and circumstances. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2 (Supp. 1991).

[136] 486 U.S. at 573-74.

[137] 111 S. Ct. at 2387.

[138] "We conclude that the police conduct in this case did not amount to a seizure, for it would not have communicated to a reasonable person that he was not at liberty to disregard the police presence and go about his business." 486 U.S. at 569.

[139] *But See Definition of a Seizure*, *supra* note 62 at 645, where Maryland Assistant Attorney General Clancy wrote that the *Chesternut* decision signaled that the *Mendenhall* test no longer commanded a majority view on the Court. Clancy viewed Justice Kennedy's concurring opinion in *Chesternut* as the emerging standard. Clancy finds support for this notion in the Court's decision in Brower v. County of Inyo, 109 S. Ct. 1378 (1989). In *Brower*, the Court held that no seizure occurred when a suspect, fleeing police in a high-speed chase at night, crashed into a police roadblock and was killed. Police cars with flashing lights and blaring sirens were in pursuit while the roadblock, consisting of an 18-wheel tractor-trailer, was set-up in a concealed position around a curve in the road. In addition, a police car with its headlights on was stationed between the oncoming car and the roadblock, thus blinding the suspect as he approached the roadblock. Justice Scalia, writing for the majority, implicitly rejected the reasonable person test when he held that a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.* at 1381 (emphasis in original).

Clancy summarized the changes resulting from *Brower*. First, the holding shifts the focus from the reasonable belief of the suspect to an objective analysis of police actions. Second, no seizure occurs until there is physical restraint or control. Clancy concluded by saying that Justice Scalia developed the bright-line rule, favored by Justice Kennedy in *Chesternut*, that no seizure occurs in a chase until the chase has reached a successful conclusion through actual physical control over the suspect's freedom of movement. Clancy further concluded that under the *Terry* requirements of an accosting and a restraint, an unequivocal show of authority satisfied both of these under the *Mendenhall* test, but now it satisfies only the accosting element. *Definition of a Seizure*, *supra* note 62, at 645. *See infra* notes 142-50 and accompanying text.

[140] Professor LaFave agreed, writing that *Chesternut* merely affirmed the prior principle that the officers' subjective intent is irrelevant unless it is communicated to the citizen. Thus, actions or words by police officers which would indicate to a reasonable person that he was being taken into custody would meet the *Mendenhall* test. "The "free to leave" concept, in other words, has nothing to do with a particular suspect's choice to flee rather than submit or with his assessment of the probability of successful flight." Professor LaFave went on to reject the idea that the *Brower* holding, requiring restraint through intentional means, was adopting Justice Kennedy's views from *Chesternut*. He felt that this interpretation was erroneous in light of the context of the *Brower* case. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2 (Supp. 1991).

[141] Even the Chesternut holding appeared to cause confusion, at least for the D.C. Circuit Court of Appeals. In United States v. Lewis, 728 F. Supp. 784 (D.D.C. 1990), rev'd, 921 F.2d 1294 (D.C. Cir.

The Court's decision in *California v. Hodari D.* further strengthens an argument that the conservative majority is dismantling the *Mendenhall* test.[142] The California Court of Appeals held that Hodari D. was seized once the police gave chase without reasonable articulable suspicion or probable cause.[143] The United States Supreme Court reversed the decision, holding that Hodari D. was not seized until he was physically grabbed by the officer.[144] The Court relied on the definition of arrest in its decision and rejected Hodari D.'s claim that the *Mendenhall* test was dispositive.[145] The *Mendenhall* test seemed to suffer irreparable damage when Justice Scalia, writing for the majority, found that the test states a necessary but not a sufficient condition to determine if a seizure occurred.[146] The *Mendenhall* test merely established an objective test for determining whether a "show of authority" exists.[147] The Court then held that a show of authority which does not cause the suspect to stop is not a seizure.[148]

The *Hodari D.* decision, when viewed in conjunction with Justice Kennedy's concurring opinion in *Chesternut*[149] and the holding in *Brower*,[150] appears to signal the demise of the *Mendenhall* test. At best, the Mendenhall test will only be used to determine if a sufficient show of authority has occurred. The test will no longer be dispositive of the seizure issue. A seizure will occur only when a sufficient show of authority actually and intentionally restricts a citizen's freedom of movement. However, the *Bostick* Court appears to be trying to indicate that a reasonable person test still exists for consensual encounter cases. The *Bostick* standard does not provide any better guide for lower courts in determining the

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1990), the court quoted Chesternut in holding that the test is either free to leave or disregard the policepresence and go about his business. The court used the *Chesternut* holding as the correct standard, in a case involving the same police practice challenged in *Bostick*. *Id.*

[142] This case involved a police chase of a youth who was found huddled around a parked car with four others. Hodari D. fled at the sight of the police car and was pursued by one of the officers on foot. The officer admitted that he had no cause for chasing the youth. Hodari D. discarded a rock of crack cocaine immediately prior to being tackled and apprehended by the officer. The California Court of Appeals suppressed the use of the cocaine as evidence as the fruits of an illegal seizure. California v. Hodari D., 111 S. Ct. 1547, 1549 (1991).

[143] *Id.*

[144] *Id.* at 1552.

[145] *Id.* at 1551. Justice Scalia wrote that, in *Chesternut*, the other case relied on by Hodari D., the Court did not address the issue of whether a show of authority (i.e. meeting the *Mendenhall* test) would be sufficient to constitute a seizure. However, Justice Scalia found the opinion in *Brower*, which he authored, to be quite relevant to the *Hodari D.* case. The Court did not even consider whether a seizure occurred during the chase in *Brower* because the show of authority did not cause the suspect to stop. Justice Scalia applied the same analysis in *Hodari D.* *Id.* at 1552.

[146] *Id.* at 1551.

[147] *Id.* Justice Stevens criticized this notion as "creative lawmaking" in his dissent. He also stated that this narrowing of the definition of a seizure significantly limits the Fourth Amendment protections provided to ordinary citizens. *Id.* at 1559 (Stevens, J., dissenting).

[148] 111 S. Ct. at 1552.

[149] *See supra* note 70 and accompanying text.

[150] *See supra* notes 139, 140 & 145 and accompanying text.

seizure issue. Thus, *Bostick* creates additional confusion, despite the Court's assurances to the contrary, as to the correct legal standard to be applied and to the limits of Fourth Amendment protection for individual citizens.

What is the Future of Fourth Amendment Rights?

The *Bostick* Court refrained from deciding whether a seizure occurred. The Court had sufficient facts before it to make the determination, but refused to do so. This refusal, combined with the decision to allow bus sweep procedures to continue, and the *Hodari D.'s* further limitation of which encounters constitute seizures, sends a strong message about the Court's views towards Fourth Amendment rights.

The Court remanded the case because it believed that the Florida Supreme Court based its decision solely on the fact that the encounter took place on a bus and not the totality of the circumstances.[151] The Court had earlier stated that it was reviewing the Florida Court's decision "which explicitly stated the factual premise for its decision."[152] A review of the Florida Supreme Court's factual premise reveals that it included all of the details of the encounter, which were analyzed under the *Mendenhall* test.[153] The Florida Supreme Court opinion expressly stated that its decision was based on the totality of the circumstances.[154]

In addition, the *Bostick* Court chose to omit two key facts from its analysis and opinion, both of which would have strengthened the argument that the encounter was coercive. First, the Court failed to mention the positioning of the officers during the encounter with Bostick.[155] Interestingly, this fact was part of the Florida Supreme Court's analysis and opinion.[156] Bostick was seated in the rear of the bus and one officer was standing in front of Bostick, partially blocking the aisle which led to the only exit from the bus.[157] Second, the Court chose to ignore information added to the record after the trial court decision regarding the bus driver's conduct. The bus driver left the bus when the officers

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[151] 111 S. Ct. at 2388.

[152] *Id.* at 2384. *See supra* note 111 and accompanying text.

[153] *Id.* at 2392 (Marshall, J., dissenting).

[154] Bostick v. State, 554 So. 2d 1153, 1154-55, 1157 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

[155] Professor LaFave recognized this factor as constituting a seizure in citing to the *Bostick* decision in the Florida Supreme Court. He stated that if an officer stood so as to partially block the only exit from the bus, then a reasonable person had no opportunity to leave or walk away. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2 (Supp. 1991).

[156] Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

[157] *Id.*

boarded, and closed the door behind him.[158] Counsel for both parties agreed that the Court could treat the bus driver's deposition as part of the record.[159] The Court chose not to do so.

The Court's reasoning for refraining to decide the seizure issue appears to be unsupported. The Florida Supreme Court considered all of the relevant facts in reaching its conclusion. The *Bostick* Court chose to ignore this fact, as well as the facts regarding the positioning of the officers and the conduct of the bus driver. The Court's decision would have been much more difficult to reach had these facts been considered.

The Court's opinion expressed doubt as to whether a seizure occurred because they saw the questioning as nothing more than a consensual encounter, without coercion, and thus not triggering Fourth Amendment scrutiny.[160] First, it is difficult to understand how the Court could reach this conclusion, that it was merely a consensual encounter, when it had already held that the facts set forth by the Florida Supreme Court were not sufficient to determine that a seizure had occurred. Second, the Court's reliance on the fact that no weapon was pointed at Bostick is misplaced. The example set forth in *Mendenhall* was "display of a weapon," not pointing a weapon, to indicate the exertion of coercive pressure.[161] Also, *Mendenhall* cited the presence of more than one officer as threatening and lending to the coercive nature of the encounter.[162] Thus, two important factors set forth in *Mendenhall* were present in *Bostick*.

The Court's failure to hold these bus sweeps unconstitutional sends a strong message to the law enforcement community. The message is that police are being given a freer reign to initiate contact with individuals without being concerned with Fourth Amendment restrictions. This message is being sent in the name of the nation's war on drugs. The Court recognized that it cannot allow those fighting the war to trample on individual rights.[163] The Court was also quick to acknowledge that it will not forbid law enforcement practices just because the Court considers them distasteful.[164]

It is difficult to understand how the Court finds the practice of bus sweeps to

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[158] These facts appear in the bus driver's deposition, which was filed with the trial court after the suppression hearing. The deposition was not a part of the record of either the Florida Court of Appeals or the Florida Supreme Court. However, the records of both courts contain a Supplemental Memorandum from Bostick to the trial court summarizing the deposition. This Memorandum was admitted into evidence. Brief of Respondent at 1-4, Florida v. Bostick, 111 S. Ct. 2382 (No. 89-1717).

[159] Brief of Respondent at 5, *Bostick* (No. 89-1717).

[160] 111 S. Ct. at 2388.

[161] *Id.* at 2393 (Marshall, J., dissenting).

[162] *See supra* note 43 and accompanying text.

[163] 111 S. Ct. at 2389.

[164] *Id.*

be nothing more than distasteful. At a minimum, the sweeps are "inconvenient, intrusive and intimidating."[165] At most, the sweeps strip the citizen of basic constitutional rights that have existed for over 200 years.[166]

Police scrutiny under the Fourth Amendment has been limited by the Court's construction of this highly artificial reasonable person who is much more assertive and likely to walk away from police than the average citizen.[167] However, these sweeps have all of the characteristics of coercion and unjustified intrusion[168] that the general warrant had and which prompted the need for the Fourth Amendment.[169] Typically, state or federal officers board a bus at an intermediate stop in the journey and, without any articulable suspicion, randomly select passengers to question.[170] The officers often display badges, weapons and other symbols of authority, and at some point announce their purpose of searching for illegal drug traffickers.[171] A passenger is then asked to produce his ticket and identification[172] and is questioned about the purpose of his journey.[173] The passengers are usually not advised of their right to refuse to cooperate, and generally end up being asked for permission to have their luggage searched.[174] These encounters take place within the cramped confines of a bus, with one officer usually at least partially blocking the exit of the bus.[175]

A passenger confronted with this scenario has very few options available. The passenger could remain seated and refuse to cooperate.[176] However, this

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[165] United States v. Chandler, 744 F. Supp. 333, 335 (D.D.C. 1990).

[166] United States v. Lewis, 728 F. Supp. 784, 788-89 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990).

[167] *Bright Line Seizures*, *supra* note 101, at 439.

[168] The purpose of these encounters is to obtain either a confession or a consent to search. This purpose is often achieved, resulting in convictions based on evidence obtained through "voluntary" cooperation with police when there was no objective grounds to initiate the encounter. *Bright Line Seizures*, *supra* note 101, at 440.

[169] 111 S. Ct. at 2389. (Marshall, J., dissenting).

[170] *Id.* at 2389-90.

[171] *Id.* at 2390.

[172] Most people would not feel seized if approached by a police officer posing relatively inoffensive questions. However, it becomes an adversarial confrontation when officers identify themselves and request that an individual produce his identification and ticket. Comment, *The Supreme Court Further Defines the Scope of Fourth Amendment Protections in Airport Drug Stops - Florida v. Royer*, 18 SUFFOLK U.L. REV. 32, 40 (1984)[hereinafter *Supreme Court Defines Scope*].

[173] 111 S. Ct. at 2390 (Marshall, J., dissenting).

[174] *Id.*

[175] *Id.*

[176] *Id.* at 2393. However, only a passenger who is familiar with the intricacies of constitutional law and with current Supreme Court decisions will feel free to ignore the police presence and leave. *Supreme Court Defines Scope*, *supra* note 172, at 41.

option is likely to lead only to intensified suspicion and scrutiny by the officers.[177] The passenger could also attempt to leave the bus, but would have to pass by the officer partially blocking the aisle, who may be displaying a weapon.[178] Even if the person is able to leave the bus, he is then faced with the prospect of being stranded in a possibly unfamiliar location without his personal belongings.[179] The police use these sweeps because the choice of cooperating or using one of the above options is really no choice at all.[180]

It is difficult to imagine the average citizen feeling free to either disregard the police or otherwise terminate the encounter under these circumstances. A passenger faced with this scenario is very likely going to feel intimidated, embarrassed and compelled to cooperate.[181] The *Bostick* decision sends the message that unless a person refuses to cooperate or refuses to leave the officer's presence, he will be deemed to have consented to the encounter. This gives police a freer hand because few, if any, citizens will know their rights or be brave enough to take this stand.

The *Bostick* and *Hodari D.* decisions allow the law enforcement arsenal of accepted investigative techniques to continue to grow in the war against drugs. The conservative Court continues to signal the expansion of broad police powers at the expense of individual Fourth Amendment rights. Both decisions have the effect of delaying the point in time when Fourth Amendment rights are invoked and also of limiting the range of police conduct which constitutes a seizure.[182]

The *Bostick* decision means that encounters with armed officers seeking to question individuals and search their luggage will become a routine part of travel in America. It would not be surprising to see police rights regarding the stopping of automobiles expanded in the near future. Citizens should prepare to be accosted on the streets, at stadiums and many other public places. Random knocks on doors to search for drugs cannot be too far away.[183]

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[177] 111 S. Ct. at 2393 (Marshall, J., dissenting). The compelling nature of police questioning can overwhelm even those citizens familiar with their constitutional rights. The vast majority of citizens who are unfamiliar with their rights will undoubtedly acquiesce to such police requests. *Supreme Court Defines Scope*, *supra* note 172, at 41.

[178] 111 S. Ct. at 2393 (Marshall, J., dissenting).

[179] *Id.* at 2393-94 (Marshall, J., dissenting). It is highly unrealistic to classify such encounters as consensual. The mere fact that the officers did not use impermissible methods to obtain compliance does not constitute consent. Note, *The Fourth Amendment: In Search of Illegal Aliens - Immigration and Naturalization Service v. Delgado*, 18 AKRON L. REV. 339, 345 n.48 (1984).

[180] 111 S. Ct. at 2394 (Marshall, J., dissenting).

[181] When the police create a coercive atmosphere, the citizen will undoubtedly feel the need to take some action in order to dispel the suspicion and continue on his way. Frequently, this results in a consent to a search which uncovers incriminating evidence. Surely this type of conduct implicates Fourth Amendment protection and scrutiny. *Bright Line Seizures*, *supra* note 101, at 468.

[182] California v. Hodari D., 111 S. Ct. 1547, 1562 (1991)(Stevens, J., dissenting).

[183] United States v. Lewis, 728 F. Supp. 784, 788-89 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (1991).

CONCLUSION

The *Bostick* decision leaves unanswered the fate of the *Mendenhall* test. It is unclear whether the Court has formulated a new standard or is attempting to refine the current one. The *Bostick* standard provides no better interpretation of conduct amounting to a seizure than does the *Mendenhall* test. The *Hodari D.* decision seems to signal a limiting, if not total abandonment, of the *Mendenhall* test. It remains to be seen whether *Mendenhall* will now be used to merely determine if a sufficient show of authority exists. It also remains to be seen whether *Hodari D.* sets forth the new standard for Fourth Amendment seizures in general, or is limited to police chase cases.

Both decisions delay the point in time at which the Fourth Amendment protections are invoked. They send a clear signal of expansion of police conduct which does not amount to a seizure.[184] As Justice Stevens stated in his *Hodari D.* dissent, an expansion of police powers always requires some sacrifice of freedom.[185] A Court more sensitive to Fourth Amendment rights would require greater rewards to society before allowing the sacrifices which result from these two decisions.[186] *Bostick* and *Hodari D.* appear to be re-defining the meaning of seizure under the Fourth Amendment.

JAMES SPALLINO, JR.

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[184] "The shocking aspect of this trend is that the Fourth Amendment protections are being slowly chiseled away." Caldwell, *Seizures of the Fourth Kind: Changing the Rules*, 33 CLEV. ST. L. REV. 323, 338 (1984-85).

[185] California v. Hodari D., 111 S. Ct. 1547, 1562 (1991)(Stevens, J., dissenting).

[186] *Id.*